No. 8363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of Charles Lemm, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK and CARR AND KENNEDY (a copartnership),

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

GLENN D. NEWTON,
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Table of Authorities Cited

Cases

Codes and Statutes

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant Olive Lemm, individually, and as administratrix of the estate of Charles Lemm, deceased, respectfully requests a rehearing on the following grounds:

1. That the order to dismiss her petition under Section 75 of the Bankruptcy Act (11 U.S.C.A. Section 203) should not have been made with prejudice, and

2. That her petition was filed in good faith.

Section 75 of the Bankruptcy Act declares that it is enacted as an emergency measure, and as this Court knows the purpose was to give relief to farmers from the financial difficulties brought about by the depression. The appellant in this case seeks nothing more than the relief permitted to her under the act. The act is in two parts. Sections A to R provide for the filing of a petition praying for a composition with the farmer's creditors, or an extension of time, within which to pay his debts. If an agreement cannot be reached, then under subdivision S, *which was not a part of the original act,* the farmer may ask to be adjudged a bankrupt or to be permitted to retain possession of his property for a period of three years on certain terms, during which time the District Court, in the exercise of its equitable jurisdiction shall protect both debtor and creditor to the end that neither shall be deprived of his property without due process. The appellant took advantage of the provisions of this act when on November 22nd, 1935, she filed the proceedings in the District Court Number 6575, which hereafter we will designate as the first proceedings. At that time, there was a paucity of judicial interpretation and the bar, as well as many of the District Courts were doubtful as to the proper procedure to be followed. On May 27th, 1935, further confusion was created when subdivision S, which had been added in 1934, was held unconstitutional by the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 79 L.Ed. 1593. A new subdivision S was enacted by Congress on August 28th, 1935, less than three months before appellant com-

menced her first proceedings. Counsel may, therefore, be excused if, in pioneering under this act, they failed to follow procedure, which later use and judicial construction showed to be proper. Even the District Courts were uncertain at the time of appellant's first proceedings as to the proper practice, and after the decision of the Supreme Court declaring the original subsection S unconstitutional, expressed doubts as to the constitutionality of the new subdivision S.

Counsel for appellant in this case proceeded in the best of faith in presenting appellant's case to the District Court. The District Court, not only in the present case, but in other similar cases, tacitly encouraged delay while awaiting a ruling by the Supreme Court on the constitutionality of the new subsection S. At no time during either the first or the second proceedings did the District Court censure appellant herein for dilatory tactics. There was no intent or desire on the part of appellant to hinder or delay creditors. As soon as appellant learned that she could not make a composition, she filed her motion for dismissal. This motion was continued from time to time by the Court of its own motion. It was not until a long time subsequently, that the creditors filed their petition to dismiss on the ground of bad faith. In the long lapse ensuing, for which appellant was in no way responsible, counsel for both parties stipulated to submit both motions *without argument,* whereupon, and on May 28th, 1936, the District Court dismissed the first proceedings upon the creditor's motion. It was then that petitioner filed an

amended petition to take advantage of subdivision S, and the creditors moved to dismiss the same. On June 15th, 1936, this motion came on for hearing before the District Court. On that occasion, after hearing all of the facts, the District Court set aside its order granting the creditor's motion to dismiss for the absence of good faith and granted appellant's own motion for dismissal for inability to make a composition. The Court at the same time dismissed the proceedings under subsection S without stating any grounds for doing so. There had at this time been no ruling by the Supreme Court on the constitutionality of this new subsection.

This Court has stated in its opinion that the dismissal of the first proceedings was no bar to the commencement of the second proceedings. Also the good faith of the first proceedings is not in question, and in fact, the record of the first proceedings will affirmatively show that the Court believed them to have been taken in good faith inasmuch as on June 15th, 1936, it set aside its previous order, made without a hearing, and permitted the dismissal to be entered on the ground of inability to make a composition. Perhaps appellant should have filed an amended petition under subsection S instead of her motion to dismiss, but we submit that the reason was that the law was new and doubtful; that counsel interpreted it to the best of his ability; that subsection S had once been declared unconstitutional; that the new subsection S had not yet been passed upon by the Supreme Court; and, that the District Courts themselves had exhibited a desire to wait before granting

relief under the new subsection S until the Supreme Court had spoken. There was no intention in following this procedure to hinder or delay creditors. Counsel's only desire was to file a new petition and ask for relief allowed under subsection S, just as soon as it was feasible to obtain it. The new subsection was not declared constitutional until March 29th, 1937. *(Wright v. Vinton Branch of the Mountain Trust Bank,* 300 U.S. 440, 81 Law Edition, 736.) Prior to that time the new subsection had been declared unconstitutional by the District Court of Virginia and the Circuit Courts of Appeal of the Fourth Circuit, the Seventh Circuit and the Eighth Circuit. The legislation had been sustained in the Fifth Circuit. (See the opening paragraph of the opinion of Mr. Justice Brandeis.) The District Courts of this state were extremely dubious of the constitutionality of the new subsection S and for this reason they were willing to keep alive the petitions under Section 75 until such time as the Supreme Court settled the question.

Appellant's only desire in this case is to be permitted the relief to which she is entitled under said subdivision S. It is the policy of the law to allow her this relief. We respectfully submit that there is nothing in the record to show that she has forfeited this right. This Court suggests that the proposal for composition advanced by appellant was even less favorable to the secured creditor than the terms guaranteed him under subsection S, and for that reason bad faith could be imputed to her. But the terms of her offer were approximately the same as the relief to which she would be entitled under subsection S, with

the exception that she asked her secured creditor to agree not to take a deficiency judgment. But it has become the policy of the law of California to place many limitations about the right to deficiencies, which formerly did not exist.

An action for a deficiency must now be brought within three months after the time of sale or it is barred by limitation.

Code of Civil Procedure, Section 337.

No deficiency can be allowed unless the notice of breach and election to sell has been recorded more than a year before the date of the sale.

Civil Code, Section 2924½.

Nor can a deficiency be obtained for more than the difference between the fair market value of the property and the amount of the indebtedness where an appraisal has been demanded by either party.

Code of Civil Procedure, Section 580 (a).

Subsection S also provides that the debtor shall have ninety days to redeem by paying the amount for which the property is sold, together with five per cent per annum interest. Except for the one request that her secured creditor waive the deficiency, which it has now become the policy of the law to favor, she has asked no more than the law permits.

We respectfully submit that the policy of Section 75 is one of liberality to the debtor; that in the present state of the record, she should not be charged with bad faith, and that she should be permitted to seek relief under subsection S and that this Court

give her at least the right to take such proceedings as will entitle her to this relief. For that reason we respectfully submit that the words "with prejudice" be struck out of the order to dismiss and that appellant be permitted to file a new petition for the sole object of obtaining the rights afforded her by subsection S.

Dated, January 19, 1938.

GLENN D. NEWTON,
Attorney for Appellant and Petitioner.

BYRON COLEMAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing, in my judgment, is well founded and that it is not interposed for delay.

Dated, January 19, 1938.

BYRON COLEMAN,
Of Counsel for Appellant and Petitioner.